

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Rules and Regulations Implementing the)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)	

REPLY COMMENTS OF NAVIENT CORPORATION



Mark W. Brennan
C. Sean Spivey
Cara O. Schenkel
HOGAN LOVELLS US LLP
555 Thirteenth Street, NW
Washington, DC 20004
(202) 637-6409

Sarah E. Ducich
Lucia Lebens
Joel S. Mayer
NAVIENT CORPORATION
999 North Capitol Street, NE, Suite 301
Washington, DC 20002
(202) 654-5900

Attorneys for Navient Corporation

June 21, 2016



Angela Buckendorf ▸ Navient ✓

June 7 at 3:27pm · 🌐

I just wanted to say thank you for the amazing customer service I received today. The agent was friendly, empathetic, and looked at all possible solutions to the problem I presented. I appreciate her actions, and Navient's decision to enable their representatives. You help more than you know.



Love



Comment



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Message



Nancy Sorensen-Schneider ▸ Navient ✓

June 10 at 12:11pm · 🌐

Thank you Emily from Navient for explaining everything to me and putting my mind at ease. 😊



Marija
@marija127



Follow

@Navient just had a wonderful experience with Amber.. She was SO helpful, came up with a solution, and got me back on track :) thank you!

EXECUTIVE SUMMARY

Congress clearly intended the Bipartisan Budget Act to provide relief from the TCPA for calls to help individuals repay their federal debts, and no single group of individuals stands to gain from Congress' amendment more than at-risk and disadvantaged federal student loan borrowers. A wide array of organizations have each highlighted the important role that student loan servicers play in keeping at-risk borrowers engaged and out of delinquency and default – outcomes that help borrowers and taxpayers alike. Many have also provided significant evidence and data in this proceeding demonstrating the positive outcomes of telephone outreach and how live contact with borrowers is critical to achieving Congress' objectives. These data-driven comments are countered only with unsubstantiated rhetoric and anecdotes.

Unreasonably strict limits on telephone contact are harmful to those who most need the assistance and will result in increased borrower delinquencies and defaults – an outcome that benefits no one. When it comes to helping student loan borrowers, *too few calls is worse than too many*. The only borrower we can't help is the borrower we can't reach. Live contact matters.

Unfortunately, the record demonstrates that the FCC's proposed rules threaten to completely unravel Congress' objectives. In adopting the Bipartisan Budget Act, Congress exempted from the TCPA's "prior express consent" requirements telephone calls made solely to collect debts owed to or guaranteed by the federal government. No amendment or policy change was needed or pursued for calls to the large majority of individuals who already provide consent and are communicative or easy to get ahold of, or for calls where consent is not required. Instead, Congress specifically and solely acted to make it easier for callers to collect federally owned or guaranteed debt from the remaining individuals who have not provided consent, have

forgotten to provide updated contact information, or are otherwise difficult to reach. But if the FCC's proposed rules are adopted, it will be as though Congress never adopted the amendment at all. In at least a half a dozen instances, the Commission's proposed rules would do more harm than good.

First, **many commenters agree that a limit of three calls per month is entirely insufficient to achieve the purpose underlying the amendment, as well as the goals set by the Administration and the Department.** Data provided by Navient and other student loan servicers show that: (a) live contact with a student loan borrower is critical to helping at-risk borrowers; (b) it takes multiple call attempts to have a live contact; and (c) multiple live contacts are required to resolve a delinquency or default. Student loan servicers are not telemarketers, and they call to provide critical information to help borrowers avoid delinquency and default. Servicers have no incentive to place unnecessary calls, and setting an upper limit on call attempts ensures that there will be harm to at least some borrowers – the ones that the servicers cannot reach before late stages of delinquency and default. Thus, if the Commission moves forward with its proposal to limit servicers to three call *attempts* per month, it will close the door on relief for tens of thousands of federal student loan borrowers and cause serious adverse consequences for borrowers and taxpayers.

Second, **only allowing calls once the borrower has become delinquent (or entered default) will prevent servicers from helping to keep borrowers out of financial danger.** The United Negro College Fund, for example, highlighted the benefits of income-driven repayment plans and described Navient's ability to make early contact with its borrowers as "paramount," even if those calls occur **before** a delinquency. The Consumer Financial Protection Bureau also encouraged the FCC to be more nuanced when adopting rules for the exemption and to recognize

the benefits of servicing calls. And some consumer groups have also urged the Commission to allow for certain categories of calls to non-delinquent borrowers.

Third, **only allowing calls to the person(s) obligated to pay the debt would severely limit federal student loan servicers' abilities to help borrowers.** Many years can pass between origination and when the borrower ceases to be enrolled and is required to begin repayment, becomes delinquent, or is in need of help. Other times, a borrower changes her number (such as when a student moves off of a family shared plan, moves to a new city, or switches to a work-provided telephone) and fails to update her contact information. Calling parties that can help locate the borrower is an effective, reasonable way to make contact with the borrower.

Fourth, **the Commission will render the exemption into virtual nonexistence if it adopts a one-call "exception to the exemption" for call attempts to reassigned telephone numbers.** It almost always takes multiple call attempts for a servicer to make live contact, and a comprehensive resource of reassigned numbers does not exist. These two factors in practical application mean that, after a servicer unsuccessfully attempts to call a borrower one time, the servicer in all likelihood will need to cease calling the borrower until such time as it can verify that the number still belongs to the borrower (if this can ever be done).

Fifth, **adopting an opt-out right would put federal student loan servicers in conflict with other federal regulations that require certain follow-up.** An opt-out provision would cause confusion for servicers and borrowers alike. Borrowers might inadvertently opt-out of receiving beneficial calls from servicers, and servicers may not be able to meet their obligations to contact borrowers who have applied to participate in an income-driven repayment plan or who are delinquent.

Sixth, a specific limit on the length or duration of exempted calls or text messages would be impractical and operationally difficult, and it would impair servicers' ability to provide borrowers with valuable information. Federal student loan options have increased in number over the past several decades, and walking borrowers through the dozens of potential options takes time. An artificial limit on the duration of a telephone call or the number of characters in a text message would have a real, negative impact on Navient's ability to fully inform its borrowers.

The few commenters that urge the Commission to adopt more stringent limits on exempted calls do a disservice to the at-risk students they purport to protect and, in some instances, provide misleading information to the Commission. For example, one organization vastly overstates the likely number of student loan borrowers affected by the Bipartisan Budget Act amendment by failing to account for the high percentage of borrowers who already provide their servicer with prior express consent. This same commenter also claims that servicers and debt collectors do not fully understand borrowers' rights associated with federal student loans, and then goes on to describe in very misleading terms the circumstances surrounding two voluntary settlements that Navient entered into on a wholly unrelated issue. Navient takes the opportunity throughout these reply comments to set the record straight on these issues.

In light of the record in this proceeding, Navient urges the Commission to revise its proposals and ensure that any rules adopted fulfill Congress' mandate and intent. Importantly, the Commission should ensure that federal student loan servicers can continue their important work helping some of the most at-risk borrowers avoid the harms of delinquency and default.

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. THE RECORD IS CLEAR: THE COMMISSION SHOULD NOT UNNECESSARILY AND DETRIMENTALLY LIMIT THE NUMBER OF EXEMPT CALLS.....	3
A. The record confirms that three call attempts per month is inadequate for the student loan context, and many commenters overwhelmingly support more frequent calling to help borrowers.	4
B. The Commission’s proposal to limit the number of exempt calls to three attempts per month disregards several other federal requirements.	7
C. The requests by a limited few commenters for unnecessarily strict calling limits are not supported with data and should be rejected.	10
D. Only live contacts with a called party should count towards any limit on the number of exempted calls.	15
III. THE COMMISSION CORRECTLY PROPOSED TO INCLUDE DEBT SERVICING CALLS WITHIN THE SCOPE OF THE EXEMPTION, AND IT SHOULD ALLOW PRE-DELIQUENCY CALLS AS WELL.	17
A. The record supports including debt servicing calls within the scope of the exemption.....	17
B. A multitude of commenters support including within the scope of the exemption calls made prior to a delinquency, so long as the calls are made solely to collect a debt owed to or guaranteed by the federal government.	18
C. A narrower scope of exempt calls will fail to protect federal student loan borrowers.	20
IV. THE COMMISSION’S RULES MUST ALLOW CALLS TO PERSONS OTHER THAN THE BORROWER AND TO NUMBERS OTHER THAN THE NUMBER PROVIDED BY THE BORROWER, CONSISTENT WITH THE BIPARTISAN BUDGET ACT.	22
A. Congress’ amendment exempts calls to persons other than the borrower, as such calls are important to the collection of federal debt.....	22
B. Congress’ amendment exempts calls to telephone numbers other than the number provided by the borrower.....	24

V. CALLERS SHOULD NOT BE PENALIZED FOR CALLS TO REASSIGNED NUMBERS UNTIL THE CALLER HAS ACTUAL KNOWLEDGE THAT THE NUMBER HAS BEEN REASSIGNED.	26
VI. ADOPTING AN OPT-OUT PROVISION WOULD ULTIMATELY HARM BORROWERS AND TAXPAYERS IS ANTITHETICAL TO THE AMENDMENT.....	28
VII. COMMISSION REGULATIONS ON RESIDENTIAL LINES OR THE DURATION OF CALLS OR MESSAGES WOULD BE CONTRARY TO THE STATUTORY AMENDMENT AND BORROWER INTERESTS.	30
A. Many commenters agree that limits on the number and duration of calls to residential landlines exceed the scope of the amendment.	30
B. Many commenters agree that the Commission should not adopt a specific limit for the length or duration of exempted calls or text communications.	31
VIII. THE FEDERAL TRADE COMMISSION BUREAU STAFF’S COMMENTS INCORRECTLY ATTEMPT TO REFRAME THE TCPA AMENDMENT AS AN ADJUNCT OF THE FAIR DEBT COLLECTION PRACTICES ACT.	33
IX. CONCLUSION.....	35

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REPLY COMMENTS OF NAVIENT CORPORATION

I. INTRODUCTION

Navient Corporation (“Navient”) respectfully submits these reply comments in response to comments filed regarding the *Notice of Proposed Rulemaking* (“NPRM”) released by the Federal Communications Commission (“FCC” or “Commission”) in the above-captioned proceeding.¹ The comments filed in the record to date demonstrate that several of the Commission’s proposed rules either do not align with the plain language of the Bipartisan Budget Act of 2015 (the “Bipartisan Budget Act”)² and Congress’ motivations for amending the TCPA, or are against the weight of the evidence in the record.

Commenters agree that the Commission’s proposed limit on the number of calls “made solely to collect a debt owed to or guaranteed by the federal government” threatens to increase the number of at-risk borrowers that suffer the harsh penalties of default – particularly in the student loan context where there are a multitude of options available to borrowers to prevent default and where the federal government possesses unique collection remedies. Based on the record in this proceeding, the Commission should ensure that any limit on the number of exempt calls it adopts applies to *live conversations* rather than call attempts. In addition, a broad swath

¹ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Notice of Proposed Rulemaking, CG Docket No. 02-278, FCC 16-57 (rel. May 5, 2016) (“NPRM”).

² Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 301, 129 Stat. 584 (2015).

of commenters agrees with Navient that servicing calls and other pre-delinquency calls should be included within the scope of the exemption.

It is crucial that the FCC's rules do not prevent student loan servicers from contacting persons other than the borrower or from calling numbers other than the number originally provided by the borrower. Moreover, the record reflects that the Commission's proposal to graft onto the Bipartisan Budget Act's amendment the "one call attempt" window to reassigned numbers is unworkable in practice and would eviscerate the relief Congress afforded in the Bipartisan Budget Act. In addition, adopting a consumer opt-out rule would create inconsistencies between the FCC's rules and other federal regulations and potentially create another avenue for frivolous litigation. Finally, many commenters agree that artificial limits on the length or duration of calls to landlines or text messages would curtail the flow of information to borrowers and are unnecessary.

In light of the record, the FCC should revise its proposals and work with Navient and other stakeholders to develop common-sense rules that will protect at-risk borrowers and allow them to receive critical information related to their federal debts.



II. THE RECORD IS CLEAR: THE COMMISSION SHOULD NOT UNNECESSARILY AND DETRIMENTALLY LIMIT THE NUMBER OF EXEMPT CALLS.

Commenting parties sharply criticized the Commission's proposal to limit the number of exempt calls allowed to three attempts per month. When it comes to the goal of helping student loan borrowers, placing too few calls is far worse than placing too many.

Student loan servicers are not telemarketers, and they are not in the business of cold-calling random telephone numbers. Instead, Navient and other federal student loan servicers call borrowers to provide them with critical information to help them avoid delinquency and default. Setting an upper limit on the number of call attempts that servicers can place ensures that some borrowers will be harmed as a result of the servicers' inability to reach them. It is for this exact reason that Congress passed the TCPA exemption in the Bipartisan Budget Act. If the Commission wants to champion the interests of consumers, it should refrain from adopting overly restrictive limits on call attempts, because to do so will only harm borrowers.

As Navient explained in its comments, live conversations are the best way to help student loan borrowers get out of delinquency and avoid defaulting on their federal debts. For example, 10.35 percent of Navient's borrowers entered the fourth calendar quarter of 2015 as seriously delinquent (*i.e.*, between 91 and 270 days delinquent on their student loans). By the end of the quarter, Navient helped approximately 80 percent of those seriously delinquent borrowers avoid default (*i.e.*, become 271 or more days past due). The key to Navient's success in preventing hundreds (if not thousands) of borrowers from defaulting each month is its ability to have a discussion with them to educate them about the various repayment, forbearance and deferment options available, and to thereafter follow up with them to ensure that required actions are taken and forms are accurately completed.

The FCC’s proposed limit also conflicts with several regulatory requirements that the Department of Education (the “Department”) and other federal regulatory agencies have established. Congress acted against the backdrop of these federal regulations and recommendations, and adopted an exemption that reflects the significant amount of data that the Department and the Administration have gathered on the benefits of outreach to at-risk borrowers, and particularly the benefits of *live* contact with borrowers. Therefore, if the Commission does adopt a limit on the number of exempt calls parties can make, the record confirms that any such limit should only be based on the number of live conversations a caller has with the borrower.

A. The record confirms that three call attempts per month is inadequate for the student loan context, and many commenters overwhelmingly support more frequent calling to help borrowers.

As Navient explained in its initial comments, student loan debt is a unique kind of federal debt.³ Several commenters agree with Navient that the FCC has good reason to adopt different rules for calls to collect federal student loan debt than rules for other kinds of federal debt.⁴ For

³ See Comments of Navient Corp., CG Docket No. 02-278 at 5-8 (filed June 6, 2016) (“Navient Comments”).

⁴ See, e.g., *Ex Parte* Letter from Walter G. Bumphus, President and CEO, American Association of Community Colleges to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278 at 1 (filed June 6, 2016) (“AACC *Ex Parte*”); *Ex Parte* Letter from Wendy H. McAlister, President & CEO, College Foundation, Inc. to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278 at 1 (filed June 10, 2016) (“College Foundation *Ex Parte*”); *Ex Parte* Letter from Debra J. Chromy, Ed.D, President, Education Finance Council to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278 at 2-3 (filed June 6, 2016) (“EFC *Ex Parte*”); *Ex Parte* Letter from Bruce Wagner, Chief Executive Officer, Finance Authority of Maine to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278 at 1 (filed June 13, 2016); *Ex Parte* Letter from Steven W. McCullough, President & CEO, Iowa Student Loan to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278 at 1 (filed June 6, 2016) (“Iowa Student Loan *Ex Parte*”); *Ex Parte* Letter from René A. Drouin, President & CEO, New Hampshire Higher Education Assistance Foundation to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278 at 1 (filed June 1, 2016); *Ex Parte* Letter from Randy Heesacker, President and CEO, National Student Loan Program to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278 at 1 (filed June 14, 2016).

example, according to the Education Finance Council (“EFC”), the national trade association representing nonprofit and state-based education loan organizations:

Federal student loans, as a unique class of unsecured debt, are unlike any other form of consumer debt. They are made to individuals with little or no credit, based solely on need and not ability to repay. When a borrower defaults, it is the U.S. taxpayer that pays the price, and unlike collateralized debt, an education cannot be repossessed.⁵

College Foundation, Inc., a 501(c)(3) non-profit organization chartered over a half-century ago by the State of North Carolina, points out that the plethora of repayment, deferment, forbearance, and forgiveness options available to federal student loan borrowers to help them get out of delinquency or rehabilitate a defaulted loan justifies a set of rules specifically for the student loan calls.⁶ The American Association of Community Colleges (“AACC”) similarly echoed Navient’s prior concern that delinquency and default create long-term consequences that are unique to student loan borrowers, such as garnishment of wages and other federal benefits.⁷

The Consumer Financial Protection Bureau (“CFPB”) also urged the Commission to engage in a “careful assessment” before adopting specific limits.⁸ The CFPB recommended that the FCC assess the different needs for and objectives of different kinds of federal debt collection activities.

⁵ EFC *Ex Parte* at 2.

⁶ See College Foundation *Ex Parte* at 1.

⁷ AACC *Ex Parte* at 1.

⁸ See Comments of the Consumer Financial Protection Bureau, CG Docket No. 02-278 at 9-10 (filed June 6, 2016) (“CFPB Comments”) (noting that “[a] careful assessment of the advantages and disadvantages of limits on such calls is needed to determine the optimal limit.”).

Several student loan servicers and associations also submitted comments and data agreeing that three call attempts per month would be inadequate to provide student loan borrowers with the information they need to avoid delinquency and default.⁹

For example, Nelnet suggests that 10 call attempts per month (or 2.3 calls per week) would be an appropriate number of calls to borrowers based on its data.¹⁰ Between three calls and ten calls to a borrower, Nelnet is able to resolve approximately 35 percent more account delinquencies, bringing these accounts out of their past due status.¹¹ Extrapolating this data for all servicers, these additional calls would have helped almost 130,000 delinquent or defaulting Direct Loan recipients in the second quarter of 2016 alone.¹²

The Student Loan Servicing Alliance (“SLSA”) similarly argues that servicers need at least 10-13 attempts per month to have a reasonable chance of speaking to a borrower.¹³ As SLSA points out, some servicers experiment with making calls at different times of the day (morning, afternoon or evening, though not all on the same day) to establish the best time of day to reach the borrower.¹⁴

⁹ See EFC *Ex Parte* at 1-2; Iowa Student Loan *Ex Parte* at 1; *Ex Parte* Letter from James P. Bergeron, President, National Council of Higher Education Resources to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278 at 11-13 (filed June 6, 2016) (“NCHER *Ex Parte*”); Comments of Nelnet, Inc., CG Docket No. 02-278 at 13 (filed June 6, 2016) (“Nelnet Comments”); *Ex Parte* Letter from James T. Farha, President, Oklahoma Student Loan Authority to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278 at 2 (filed June 3, 2016) (“OSLA *Ex Parte*”); Comments of the Student Loan Servicing Alliance, CG Docket No. 02-278 at 26 (filed June 6, 2016) (“SLSA Comments”).

¹⁰ Nelnet Comments at 14.

¹¹ *Id.*

¹² According to the latest FSA data, approximately 2.8 million recipients of Direct Loans were 31 days or more delinquent on their accounts as of the second quarter of 2016. See Dept. of Ed., Fed. Student Aid Data Ctr., *Direct Loan Portfolio by Delinquency Status*, <https://studentaid.ed.gov/sa/about/data-center/student/portfolio> (last visited June 17, 2016).

¹³ SLSA Comments at 26.

¹⁴ *Id.*

Additional calls can equate to helping tens of thousands of borrowers avoid the ruinous effects of default each month. As the National Council of Higher Education Resources (“NCHER”) succinctly stated: “call attempts lead to live contacts, and live contacts lead to successful resolutions.”¹⁵ This idea is at the heart of the issue Congress attempted to address when it passed the Bipartisan Budget Act amendment to the TCPA.

Several commenters have also pointed out that a limit of three call attempts per month would render the exemption “virtually meaningless.”¹⁶ Navient agrees with the Credit Union National Association that the FCC’s proposed limit on exempt calls is a “missed opportunity [that] does not address the concerns [of] Congress, the President, other regulators, consumers, and the financial services industry”¹⁷ The Commission should not construe the exemption in such a way as to subvert Congress’ mandate and intent in creating the exemption in the first place.

B. The Commission’s proposal to limit the number of exempt calls to three attempts per month disregards several other federal requirements.

As discussed above, commenters have submitted sound legal and policy reasons for allowing more than three calls per month to collect federal student loan debt. But the Commission’s proposed limit also disregards a host of other federal rules, regulations, and policies that often require servicers to contact borrowers more than three times per month.

¹⁵ NCHER *Ex Parte* at 12.

¹⁶ See, e.g., *Ex Parte* Letter from Diana R. Dykstra, President and CEO, California and Nevada Credit Union Leagues to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278 at 1 (filed June 6, 2016); see also *Ex Parte* Letter from Leah Dempsey, Sr. Director of Advocacy and Counsel, Credit Union National Association to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278 at 2 (filed June 3, 2016) (“CUNA *Ex Parte*”); SLSA Comments at 25.

¹⁷ CUNA *Ex Parte* at 3.

In addition to the examples that Navient included in its initial comments related to the Department's rules, change requests, and servicing policies, several commenters have provided evidence of additional federal agency rules and regulations that require servicers and other parties to make more than three calls per month to federal debtors under certain circumstances. For example, the American Bankers Association and Consumer Bankers Association submitted an entire appendix to their comments of federal servicing requirements with which a three-call-attempts-per-month rule would conflict.¹⁸ The Home Affordable Modification Program ("HAMP"), National Mortgage Settlement rules, and Fannie Mae and Freddie Mac servicing requirements all require servicers to make more than three calls per month.¹⁹ The United States Department of Housing and Urban Development also requires servicers to make two calls per week until the servicer establishes contact with the borrower.²⁰ The Consumer Mortgage Coalition provided a list of various federal requirements related to consumer mortgages that aid in preventing foreclosure, including calls made pursuant to HAMP, calls to delinquent Federal Housing Administration consumers, calls under Veterans Administration regulations, and calls made through other federal regulatory programs.²¹

Whatever limit on the number of calls to collect federal debts, if any, the FCC ultimately adopts, its TCPA rules should be flexible enough to accommodate other federal agency rules,

¹⁸ See *Ex Parte* Letter from Jonathan Thessin, Senior Counsel, Center for Regulatory Compliance, American Bankers Association and Kate Larson, Regulatory Counsel, Consumer Bankers Association to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278 at 10, App. (filed June 6, 2016) ("ABA/CBA *Ex Parte*").

¹⁹ ABA/CBA *Ex Parte* at 10.

²⁰ *Ex Parte* Letter from Bill Himpler, Executive Vice President, American Financial Services Association to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278 at 6 (filed June 6, 2016) ("AFSA *Ex Parte*").

²¹ See *Ex Parte* Letter from Anne C. Canfield, Executive Director, Consumer Mortgage Coalition to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278 at 5-10 (filed June 6, 2016) ("CMC *Ex Parte*").

regulations, and policies regarding call attempts. Servicers of federal debts are not fly-by-night entities; instead, they operate pursuant to well-established best practices. Claims to the contrary obscure the facts. For example, the National Consumer Law Center (“NCLC”) cites to two voluntary settlements that Navient reached in May 2014 related to the Servicemembers Civil Relief Act (“SCRA”) as purported evidence that student loan servicers regularly violate consumer protection laws and regulations.²² NCLC is either unfamiliar with the facts underlying the voluntary settlements or purposefully omitted them from its comments.

As Navient has previously explained, publicly, the SCRA and the Department’s implementing regulations required service members to provide two documents to prove eligibility for capped interest rates—a burdensome requirement that Navient and other servicers proactively asked the Department to simplify as early as 2011.²³ In fact, Navient was forced to seek a waiver of the Department’s rules before it could comply with the terms of the settlements releasing service members from providing this information.²⁴ Contrary to NCLC’s claims, this provides no evidence of Navient not being “adequately trained to understand and administer [] complex borrower rights”²⁵ It is the exact opposite. Navient was fully aware of the regulations and even attempted on multiple occasions to change them to make them better for military borrowers, but its suggestions were not adopted, and Navient was only later criticized by a separate federal agency for following the Department’s requirements.

²² Comments of National Consumer Law Center, CG Docket No. 02-278 at 12 (filed June 6, 2016) (“NCLC Comments”).

²³ See Jack Remondi, *Setting the Record Straight on SCRA*, MEDIUM (Mar. 13, 2016), <https://medium.com/@JackRemondi/setting-the-record-straight-on-scra-e642fa370d0a#.v6p7i2gdv>.

²⁴ *Id.*

²⁵ NCLC Comments at 11.

Federal student loan servicers protect important federal interests, and consistent with the CFPB’s comments, the FCC should ensure that any limits on exempt calls account for agencies’ varying needs and objectives.²⁶

C. The requests by a limited few commenters for unnecessarily strict calling limits are not supported with data and should be rejected.

Commenters who urge the Commission to limit exempt calls to three call attempts per servicer or collector per month fail to explain why three calls is an appropriate limit.²⁷ For example, suggestions that allowing for more than three calls per month will “open the floodgates” to a sea of new calls are simply mistaken – servicers have no incentive to place unnecessary calls. And the NCLC is incorrect to claim that Congress’ amendment opens a new pathway for servicers to call the approximately 42 million unduplicated recipients of federal student loans.²⁸ As noted in our initial comments, Navient already has prior express consent to autodial approximately nine out of ten of its borrowers, meaning that the Bipartisan Budget Act’s amendment to the TCPA will not vastly increase the amount of calls Navient will make.²⁹

Similarly, a second commenter cited to a recent story of a Navient federal student loan borrower who enrolled in community college but left school without obtaining a degree, and

²⁶ See CFPB Comments at 9-10.

²⁷ See *Ex Parte* Letter from Maureen Mahoney, Policy Analyst, Consumers Union to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278 at 4 (filed June 6, 2016) (“CU *Ex Parte*”); *Ex Parte* Letter from Jennifer Wang, DC Office Director, The Institute for College Access & Success to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278 at 3 (filed June 6, 2016) (“TICAS *Ex Parte*”); *Ex Parte* Letter from Carolyn Coffey, Director of Litigation for Economic Justice, MFY Legal Services, Inc. to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278 at 2 (filed June 6, 2016) (“MFY *Ex Parte*”); NCLC Comments at 3; *Ex Parte* Letter from Reid Setzer, Deputy Director of Policy & Legislative Affairs, Young Invincibles to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278 at 2 (filed June 6, 2016) (“Young Invincibles *Ex Parte*”).

²⁸ NCLC Comments at 7.

²⁹ Navient Comments at v.

who, despite our best efforts, we were unable to contact and help avoid default.³⁰ After noting the fact that we attempted to *contact* the borrower more than 250 times over a 12-month period, the commenter argued that “[c]alling repeatedly does not guarantee success” and that the FCC should adopt rules to prevent “voluminous calls.”³¹ This construction might lead the FCC to believe that Navient called this borrower 250 times over a 12-month period (which in and of itself would equate to less than one call per day). But Navient in fact used email, letters, telephone calls, and text messages to contact the borrower during this period (as was reported in the article).³²

NCLC also argues that exempt calls “invade consumers’ privacy, use up cell phone minutes they need, and create dangers due to distraction.”³³ But none of these arguments hold up under scrutiny. First, Congress’ grant of an exemption from the consent requirements is a clear expression that there should be a “thumb on the scales” in favor of the government’s interests in collecting federally owned and guaranteed debts and helping at-risk borrowers avoid negative financial consequences, over any limited privacy interest that an individual call recipient may have. And in this particular context, any such privacy interest is in fact quite limited. The TCPA itself only imposes the consent requirements when certain technologies are used to make these non-marketing calls (and only then when the calls are made to wireless telephones and other limited types of telephone lines). Such calls not made using an “automatic telephone dialing system” (“ATDS”) or prerecorded voice are not restricted, and there is simply no difference from

³⁰ TICAS *Ex Parte* at 2.

³¹ *Id.*

³² See Stephanie Eidelman, *Navient CEO Shares Rarely Heard Stories About Student Debt Payment*, INSIDEARM (May 31, 2016), <http://www.insidearm.com/opinion/navient-ceo-shares-rarely-heard-stories-about-student-debt-payment/>. NCLC did acknowledge in its reproduction of the article that Navient’s contacts included email, letters, telephone calls and text messages. See NCLC Comments at 13.

³³ NCLC Comments at 24.

the call recipient's perspective between many ATDS calls and non-ATDS calls. To fabricate some distinct privacy right between the calls when the consumer experience is the same is disingenuous. Unfortunately, the Commission's interpretation of an ATDS in its 2015 TCPA Omnibus Declaratory Ruling³⁴ has created significant uncertainty regarding which calls are placed using an ATDS, which is why callers need to be able to rely on the new exemption that Congress provided.

Second, allowing additional call attempts is unlikely to have any impact on subscribers' cell phone minutes or impose any charges (and even if they did, the call recipient can manage any impact by answering a single call). And Finally, NCLC has cited no evidence that calls from federal student loan servicers have had any impact on distracted driving on those borrowers that already provide consent, or why such calls would somehow disproportionately apply to or impact borrowers for which the caller had not obtained consent.

The organizations that support the Commission's proposed limit also do not recognize the confusion that federal student loan borrowers have today due to the rapid increase in borrowers' options and the difficult position in which many servicers operate today. In 1990, there were two repayment plans and a limited number of deferment options available to borrowers. Now there are at least 16 different repayment plans and 32 deferment or forbearance plans available to borrowers, as described in the graphic on the next page.

³⁴ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, et al.*, Declaratory Ruling and Order, 30 FCC Rcd 7961 (2015).

There Are Now 16 Different Repayment Plans and Multiple Types of Deferment, Forbearance, and Forgiveness Options

Forbearance

Discretionary Forbearance

- Hardship Forbearance

Mandatory Forbearance

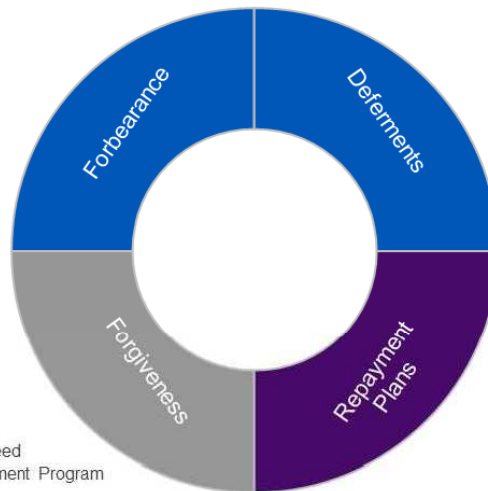
- Medical or Dental Internship/Residency
- Department of Defense Student Loan Repayment Programs
- National Service
- Active Military State Duty
- Student Loan Debt Burden
- Teacher Loan Forgiveness

Mandatory Administrative Forbearance

- Local or National Emergency
- Military Mobilization
- Designated Disaster Area
- Repayment Accommodation
- Death
- Teacher Loan Forgiveness

Forgiveness

- Teacher Loan Forgiveness
- Loan Forgiveness for Service in Areas of National Need
- Civil Legal Assistance Attorney Student Loan Repayment Program
- Income Contingent Repayment Plan Forgiveness
- Income Based Repayment Plan Forgiveness
- Pay As You Earn Repayment Plan Forgiveness
- Income Based 2014 Repayment Plan Forgiveness
- REPAYE Repayment Plan Forgiveness
- Public Service Loan Forgiveness



Deferment

- School (1)
- School Full-Time (2)
- School Half-Time (2)
- Post Enrollment (1)
- Graduate Fellowship (3)
- Unemployment Deferment – 2 years (2)
- Unemployment Deferment – 3 years (1)
- Economic Hardship (1)
- Rehabilitation Training Program (3)
- Military Service (3)
- Post-Active Duty Student (3)
- Teacher Shortage (2)
- Internship/Residency Training (2)
- Temporary Total Disability (2)
- Armed Forces or Public Health Services (2)
- National Oceanic and Atmospheric Administration Corps (2)
- Peace Corps, ACTION Program, and Tax-Exempt Organization Volunteer (2)
- Parental Leave (2)
- Mother Entering/Re-entering Work Force (2)

Repayment Plans

- DL Standard Pre-HERA
- FFELP/DL Standard Post-HERA (4)
- DL Graduated Pre-HERA
- FFELP/DL Graduated Post-HERA (4)
- DL Extended Pre-HERA
- FFELP/DL Extended Post-HERA (4)
- Income-Sensitive
- Income-Contingent Ver. 1 (5)
- Income-Contingent Ver. 2 (5)
- Income-Contingent Ver. 3
- Forced Income-Driven
- Income-Based
- Pay As You Earn
- Income-Based 2014
- Alternative (6)
- REPAYE

Effective Date Details

- (1) Limited to FFELP borrowers with all new loans made on or after July 1, 1993; All DL are eligible.
- (2) Limited to FFELP borrowers with all loans made on or after July 1, 1987 and prior to July 1, 1993; DL eligible if borrower has FFELP loan made during this period.
- (3) All FFELP and DL loans eligible regardless of disbursement date
- (4) HERA aligned FFELP and DL repayment plans for loans first entering repayment on or after July 1, 2006.
- (5) Pre July 1, 1996, ICR plans, the DL borrower can choose between ICR1 - the Formula Amount, or ICR2 – the Capped Amount.
- (6) The DL borrower can request from 5 alternative repayment plans: Fixed Payment Amount, Fixed Term, Graduated Repayment, Negative Amortization, or Post REPAYE.

NAVIENT

These organizations similarly fail to appreciate the nuances of the FCC's TCPA rules and decisions. Consumers Union, for example, claims that servicers can easily get in touch with consumers by simply "picking up the telephone and making a call, by emailing, or by sending a letter."³⁵ But Consumers Union overlooks the fact that servicers were already engaging in email and letter outreach when Congress deemed it necessary to facilitate additional calls to borrowers. It also fails to address the serious uncertainty that commenters and appellants have raised with

³⁵ CU *Ex Parte* at 2.

the FCC’s interpretation of the term “automatic telephone dialing system” (as discussed above) – namely, that the only “safe” solution that the FCC has identified is a rotary telephone.³⁶

Consumers Union does not provide an example of a non-autodialed call that it would view as safe. Most importantly, Consumers Union fails to include any data to support the claim that a servicer just needs to simply “pick up the telephone.” Conversely, servicers provided a mountain of data on call attempts often required to reach a struggling or at-risk borrower.

NCLC goes one step further and suggests—without any supporting evidence—that Navient’s recent attempts to help a borrower may have worsened a borrower’s situation.³⁷ Specifically, in its comments NCLC cited to the same story noted above about the Navient federal student loan borrower who enrolled in community college but left school without obtaining a degree.³⁸ After noting that we diligently attempted to contact the borrower more than 250 times over a 12-month period, NCLC claimed that “[t]he bottom line is that even 250 attempted contacts do not guarantee success, *and may even have made the situation worse.*”³⁹

It is hard to imagine how our efforts could have made this situation worse, particularly in light of the severe, harsh penalties that accompany federal student loan default and the fact that the borrower may very likely have been eligible for an income-driven repayment (“IDR”) plan. In fact, the same news story NCLC cited included a borrower who, like the above borrower, went nine months without responding to our extensive outreach, yet talked with our representative at **270 days** of delinquency, enrolled in an IDR plan, and successfully avoided

³⁶ See, e.g., CUNA *Ex Parte* at 4-5; EFC *Ex Parte* at 6; SLSA Comments at 4.

³⁷ NCLC Comments at 13.

³⁸ See *id.*

³⁹ *Id.* (emphasis added).

default – an outcome that is clearly favorable. NCLC’s unsupported and unsubstantiated claim, designed though it may be to elicit sympathy for its cause, has no basis in fact.

D. Only live contacts with a called party should count towards any limit on the number of exempted calls.

Several commenters urged the Commission to base any limit it adopts on the number of exempt calls on actual live contacts with a borrower, rather than mere call attempts.⁴⁰ As NCHER and other commenters have explained, a limit on the number of attempts to contact, without reference to whether or not live contact is made, would effectively nullify the exemption (at least in the student loan context).⁴¹

It takes servicers multiple attempts to reach a borrower before live contact is made, and multiple live contacts to provide a borrower with the necessary information to resolve a delinquency or rehabilitate a default.⁴² The American Financial Services Association (“AFSA”) similarly agrees that three calls per month are rarely sufficient to provide borrowers with adequate information, especially if those calls are not answered.⁴³ According to the Educational Credit Management Corp. (“ECMC”), it takes an average of **14.3 attempts** to contact a consumer before a federal student loan servicer establishes a right party contact for a defaulted student loan.⁴⁴ For calls to delinquent, but not yet defaulted, borrowers it takes servicers **between 8.5 and 21.4 attempts** to contact a consumer before a right party contact is established

⁴⁰ See, e.g., AACC *Ex Parte* at 2; *Ex Parte* Letter from John K. Rossman, Counsel to Continental Service Group, Inc. d/b/a ConServe to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278 at 10 (filed June 6, 2016) (“ConServe *Ex Parte*”).

⁴¹ See, e.g., NCHER *Ex Parte* at 11.

⁴² See EFC *Ex Parte* at 6-7; SLSA Comments at 26.

⁴³ AFSA *Ex Parte* at 5-7.

⁴⁴ See *Ex Parte* Letter from David L. Hawn, Chief Executive Officer, Educational Credit Management Corp., Inc. to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278 at 7 (filed June 3, 2016) (“ECMC *Ex Parte*”).

(and takes more attempts to reach a right party contact the longer the borrower is delinquent).⁴⁵

These statistics are consistent with Navient's experience servicing federal student loans, and if the Commission limits the number of calls allowed for under the exemption to three attempts per month it will severely curtail Navient's ability to ever reach a right party contact (and would be doing so for the most at-risk borrowers).

At least one commenter has argued that a limit of three calls per month – even if a live connection is achieved during each call – may be insufficient to provide borrowers with adequate information.⁴⁶ Navient agrees, but at a minimum would urge the Commission to only count calls that result in live conversations in any limit it ultimately adopts.

Hannah Baggott
@hannahbaggott



 Follow

Huge thanks to @Navient for an affordable payment plan & not making fun of me when I admitted to hiding from them. #studentloans

⁴⁵ *Id.*

⁴⁶ ConServe *Ex Parte* at 10.

III. THE COMMISSION CORRECTLY PROPOSED TO INCLUDE DEBT SERVICING CALLS WITHIN THE SCOPE OF THE EXEMPTION, AND IT SHOULD ALLOW PRE-DELIQUENCY CALLS AS WELL.

A. The record supports including debt servicing calls within the scope of the exemption.

Several commenters agree with Navient and the Commission that servicing calls should be included in the scope of the exemption.⁴⁷ Among other benefits, servicing calls create a vital pathway for providing information to an at-risk or struggling borrower. Many individuals who qualify for federal student loan reduced payment options, deferment, forbearance, or forgiveness may not understand the complexities of these programs and therefore do not enroll.⁴⁸ Based on data from Navient’s servicing records, more than half of borrowers enrolling in IDR for the first time could not navigate the options on their own, and one in five borrowers renewing required support. As discussed in our prior filings, when Navient makes live contact with student loan borrowers, it is able to help more than 90 percent of them avoid default. Thus, live telephone contact is the common denominator for those who become delinquent and successfully avoid default, whereas no live telephone contact is common among those who default.

The CFPB also “agrees that servicing calls can be beneficial to consumers”⁴⁹ In a separate context, CFPB Director Richard Cordray recently highlighted the benefits to consumers of receiving real-time information about their bank accounts, which helps consumers avoid inadvertently overspending their accounts.⁵⁰ Federal student loan borrowers would also benefit

⁴⁷ See, e.g., *ECMC Ex Parte* at 3; *EFC Ex Parte* at 1, 4; *NCHER Ex Parte* at 4; *OSLA Ex Parte* at 2.

⁴⁸ *ECMC Ex Parte* at 3.

⁴⁹ CFPB Comments at 6.

⁵⁰ See *AFSA Ex Parte* at 7 (citing Richard Cordray, Director, Consumer Financial Protection Bureau, Remarks at Checking Account Access Field Hearing (Feb. 3, 2016)).

from “real-time” information from their servicers that informs them of helpful repayment options and prevents them from becoming delinquent on their loans or entering default.

Navient also agrees with ConServe and other commenters that the plain meaning of the Bipartisan Budget Act’s amendment to the TCPA clearly includes servicing calls. As Navient noted in its initial comments, the scope of the Bipartisan Budget Act’s exemption to the TCPA is based on the purpose of the call.⁵¹ Stated another way, if a party makes a call to collect a debt owed to or guaranteed by the United States, the TCPA does not apply. Student loan servicing calls therefore qualify for treatment under the statute because they are an “indivisible, integral part of debt collection calls”⁵²

B. A multitude of commenters support including within the scope of the exemption calls made prior to a delinquency, so long as the calls are made solely to collect a debt owed to or guaranteed by the federal government.

The record overwhelmingly supports including within the scope of the exemption calls made prior to when a debtor becomes delinquent.⁵³ For example, the United Negro College Fund (“UNCF”) recommends that the FCC permit loan servicers to use autodialer technology to contact borrowers to advise them of their repayment options.⁵⁴ According to UNCF, “maximizing the ability of loan servicers to make early contact with borrowers to provide

⁵¹ Navient Comments at 28.

⁵² ConServe *Ex Parte* at 5.

⁵³ See, e.g., Comments of ACA International, CG Docket No. 02-278, at 9 (filed June 6, 2016) (“ACA Comments”); AACC *Ex Parte* at 2; ABA/CBA *Ex Parte* at 6-8; College Foundation *Ex Parte* at 1; ConServe *Ex Parte* at 4-5; Comments of Credit Union of the Dakotas, CG Docket No. 02-278 at 3 (filed June 1, 2016) (“CUAD Comments”); ECMC *Ex Parte* at 3; EFC *Ex Parte* at 5-6; Iowa Student Loan *Ex Parte* at 1; NCHER *Ex Parte* at 3; Nelnet Comments at 8; *Ex Parte* Letter from Rene A. Drouin, President and CEO, NHHEAF Network Organizations to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278 at 1 (filed June 1, 2016); OSLA *Ex Parte* at 2; *Ex Parte* Letter from Margaret Eardley, President and Chief Operating Officer, Pinnacle Recovery to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278 at 1 (filed June 10, 2016); SLSA Comments at 18-20.

⁵⁴ See *Ex Parte* Letter from Michael L. Lomax, Ph.D, President and CEO, United Negro College Fund to The Hon. Tom Wheeler, Chairman, FCC, CG Docket No. 02-278 at 2 (filed June 6, 2016) (“UNCF *Ex Parte*”).

information on repayment options before delinquency is paramount.”⁵⁵ UNCF specifically cites IDR education and re-enrollment as examples of instances when borrowers would benefit from pre-delinquency calls.⁵⁶ EFC, meanwhile, recommends that the FCC allow for calls to federal student loan borrowers under a variety of circumstances, such as when there is a pending change in loan status, a regulatory deadline approaching, or an action required by the borrower, “all of which may and do occur prior to delinquency.”⁵⁷ Navient agrees.

Indeed, Nelnet confirms that the FCC’s proposed rules conflict with certain Department requirements related to student loan servicing.⁵⁸ For example, under the Department’s IDR plan-completion program, servicers are required to make reminder and follow-up calls to borrowers that have begun but have not completed the application process.⁵⁹ The plain import of these requirements is that servicers must make calls to borrowers who are not yet delinquent in their student loan, in direct contradiction to the FCC’s proposed rules.

Commenters also echo Navient’s position that any regulations limiting the scope of the exemption to borrowers who are delinquent or in default are contrary to Congress’ intent as expressed in the Bipartisan Budget Act. As ACA explained, “Congress made absolutely no mention of the exemption being limited to calls made post-delinquency or post-default. As a result, it would be inappropriate for the Commission to *read* such a limitation into the amendment.”⁶⁰ Navient also agrees with SLSA that, had Congress wanted to limit the exemption to defaulted or delinquent debt, “it could have easily done so by simply saying ‘calls to collect

⁵⁵ UNCF *Ex Parte* at 2.

⁵⁶ *Id.*

⁵⁷ EFC *Ex Parte* at 5.

⁵⁸ *See* Nelnet Comments at 7.

⁵⁹ *Id.*

⁶⁰ ACA Comments at 9 (emphasis added).

past due debt,’ [or] ‘calls to collect defaulted [and delinquent] debt.’”⁶¹ Congress’ use of the broader phrase to “collect a debt” means that debts other than those in delinquency are included within the scope of the exemption. As ABA and CBA note, any rule limiting the scope of the exemption to calls made after the borrower is delinquent or in default would exceed the clearly defined limitations allowed by Congress.⁶²

In much the same way that all foreclosure prevention discussions are solely to collect a debt,⁶³ all delinquency prevention discussions are solely to collect a debt owed to or guaranteed by the federal government. Federal student loan borrowers would benefit from pre-delinquency calls, which is presumably one reason Congress did not limit the scope of its exemption to the TCPA so as to exclude these helpful communications.

C. A narrower scope of exempt calls will fail to protect federal student loan borrowers.

A small number of commenters urge the Commission to limit the scope of the exemption to calls when the debt is delinquent or when the consumer is delinquent in responding to a notice for entering into a payment plan or forbearance program.⁶⁴ While we appreciate that these groups recognize the importance of communicating with borrowers about completing repayment or forbearance plan applications, these commenters’ proposed limitation is insufficient to protect borrowers.

⁶¹ SLSA Comments at 19; *see also* ConServe *Ex Parte* at 3-4 (“Section 227(b)(1)(A)(iii), as amended by the Budget Act, does not distinguish between a debt that is ‘delinquent’ or ‘in default . . .’ Likewise, the unqualified use of the terms ‘debt’ and ‘guarantee’ reflect Congress’ desire that the exemption apply not only to calls concerning *current* debts to the United States, but also *contingent* debts.”).

⁶² ABA/CBA *Ex Parte* at 6.

⁶³ CMC *Ex Parte* at 13.

⁶⁴ *See* CU *Ex Parte* at 4; MFY *Ex Parte* at 2; NCLC Comments at 3; TICAS *Ex Parte* at 3; Young Invincibles *Ex Parte* at 2.

Limiting the exemption in the manner proposed would prevent Navient from providing its borrowers with valuable, time-sensitive information. For example, borrowers can benefit from calls or text messages reminding the borrower that a payment is due in the near future or that an applicable grace period is coming to an end.⁶⁵ Likewise, borrowers benefit from calls that follow up on missing or incomplete forms related to student loan discharge provisions, such as when the student's school closes or the borrower suffers a disability. Indeed, NCLC in its comments cites to testimony from the CFPB's Student Loan Ombudsman that borrowers have filed complaints regarding issues such as servicing transfers and loan modifications, and that it is critical that the federal government "ensure that student loan servicers are providing adequate customer service and following the law."⁶⁶

Yet NCLC's solution to the problem is to **further diminish** servicers' abilities to contact borrowers and provide them with valuable information, contrary to the recommendations of the Department, the Obama Administration and a host of others. Under the limited interpretation of the exemption set forth above, Navient would arguably be prevented from contacting borrowers regarding these issues.

These groups' proposed limitation on the exemption is not only bad policy, but also contrary to the statute. It is the *purpose* of the call that drives the exemption. As discussed above, *any* call made solely for the purpose of collecting a debt owed to or guaranteed by the federal government is exempt, and the FCC would slight Congress' intent in adopting the amendment if it narrowed the scope of the exemption in the way sought by these groups. Instead, Navient urges the FCC to include within the scope of the exemption *all* calls made to

⁶⁵ See CUAD Comments at 3; NCHER *Ex Parte* at 3.

⁶⁶ NCLC Comments at 12-13.

collect debts owed to or guaranteed by the federal government, regardless of whether the debt is currently delinquent.



IV. THE COMMISSION’S RULES MUST ALLOW CALLS TO PERSONS OTHER THAN THE BORROWER AND TO NUMBERS OTHER THAN THE NUMBER PROVIDED BY THE BORROWER, CONSISTENT WITH THE BIPARTISAN BUDGET ACT.

A. Congress’ amendment exempts calls to persons other than the borrower, as such calls are important to the collection of federal debt.

Calls to persons other than the borrower are plainly exempted under the Bipartisan Budget Act amendment if the call is placed for the purpose of collecting federal debt.⁶⁷ Such calls are critical tools to assist loan servicers in locating borrowers to provide them with important, helpful, and time-sensitive information about their loans.

Other commenters agree that the purpose of the call – not the recipient – determines whether the call is exempt under the Bipartisan Budget Act amendment.⁶⁸ The FCC can limit the

⁶⁷ See Navient Comments at 35.

⁶⁸ See, e.g., SLSA Comments at 17-18.

“number” and “duration” of those calls, but it cannot exclude them entirely from the exemption granted by Congress.⁶⁹ SLSA notes that if “the purpose of the call is solely to collect a federal debt, then it is a covered call, and the exemption applies.”⁷⁰ ConServe agrees that the “phrase ‘solely to collect a debt’ does not act as a limitation of calls to only the person or persons obligated to pay the debt.”⁷¹ Indeed, Congress could have limited the exemption “based on the recipient of the call, but declined to do so.” Instead, the language of the amendment demonstrates that “the availability of the exemption depends on the *purpose* of the call alone.”⁷²

Calls to non-borrowers serve important functions, underscoring why Congress declined to carve them out of the exemption. For example, such calls are a critical avenue for creditors to obtain information about the location of a debtor. In Navient’s experience, contacting a relative or reference listed on a borrower’s student loan application can be the most effective way to reach a borrower.⁷³ Other commenters agree. ACA International explains that “an inherent part of the debt collection process is being able to locate a debtor through ‘skiptracing’ efforts.”⁷⁴ ACA further emphasizes that “it would severely undercut the effectiveness of the exemption created by Congress not to include skiptracing calls as covered calls,” and the Commission “should make clear that calls made to third parties solely to obtain location information from a debtor” are covered calls.⁷⁵

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ ConServe *Ex Parte* at 5-6 (emphasis in original).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ ACA Comments at 11.

⁷⁵ *Id.*

Locating a student loan borrower is particularly important considering the passage of time that may occur from when the loan is taken out versus when a borrower may be at risk for delinquency or default, such as in the case of a student who spends time in school before the loan's grace period ends and the time for repayment begins. Students are by definition in a transitional state, and may be providing contact information for parents' homes and telephone numbers at which, upon graduation, they can no longer be reached. The sooner a lender is able to connect with a borrower at risk of delinquency, the better the lender will be able to help the borrower to stay current, enroll in plans that address their situation, and avoid consequences such as negative credit reporting and default. Allowing calls to persons other than the borrower would thus be consistent with the Bipartisan Budget Act amendment's language and would support the goal of improved and efficient collection of federal debt.

B. Congress' amendment exempts calls to telephone numbers other than the number provided by the borrower.

The Commission cannot limit the exemption to calls placed to the number provided by a borrower.⁷⁶ Calls placed to the number provided by a borrower are made with "prior express consent" (absent instructions from the borrower to the contrary) and thus would not be placed pursuant to the Bipartisan Budget Act amendment exemption.⁷⁷ This restriction would contravene the very purpose of the TCPA amendment, which is specifically to enable calls *without* prior express consent.⁷⁸

Many commenters agree. For example, the ABA and CBA state in their joint comments that this "restriction does not concern the number or duration of exempted calls," but concerns

⁷⁶ Navient Comments at 50.

⁷⁷ *Id.*

⁷⁸ *Id.*; see also ABA/CBA *Ex Parte* at 8.

“how the lender obtained the telephone number to which an exempted call is directed. As such, the limitation is not allowable under the [Bipartisan Budget Act].”⁷⁹

Several commenters also agree with Navient in recognizing that limiting the scope of the exemption to the number provided by the borrower would defeat the purpose of the amendment.⁸⁰ Nelnet explains that under the NPRM’s proposal, Nelnet would remain unable to autodial 37 percent of its borrowers.⁸¹ Borrowers are unable to receive crucial information from lenders if the lender is unable to use the correct number for the borrower, which may not be the number the borrower provided. Numbers may have been reassigned or been disconnected, or borrowers may have moved or switched service providers. Student loan borrowers are particularly “transitory and technologically progressive” and as such the telephone number provided on their loan applications “may be that of their parents’ home” and has likely changed at least once before the borrower enters repayment.⁸² Navient urges the Commission to allow for calls to numbers other than the number initially provided by the borrower, consistent with the statute, the Amendment, and the needs of borrowers and lenders.



⁷⁹ ABA/CBA *Ex Parte* at 8.

⁸⁰ *See, e.g.*, ACA Comments at 9-10; NCHER *Ex Parte* at 7.

⁸¹ Nelnet Comments at 10.

⁸² *Id.*

V. CALLERS SHOULD NOT BE PENALIZED FOR CALLS TO REASSIGNED NUMBERS UNTIL THE CALLER HAS ACTUAL KNOWLEDGE THAT THE NUMBER HAS BEEN REASSIGNED.

The Commission should not apply its “one-call attempt” to reassigned numbers framework to calls that Congress expressly exempted from the requirement to obtain the “prior express consent of the called party.” Applying the one-call framework would not only present several substantial compliance challenges but also fall outside of the parameters of Congress’ plain language and intent in adopting the Bipartisan Budget Act amendment.

Servicers receive no benefit from calling numbers that they know have been reassigned,⁸³ and there is no reason for the Commission to adopt overly proscriptive rules to curtail behavior in which callers have no pecuniary interest engaging. And although some might speculate that callers have a financial interest in placing ATDS or prerecorded voice calls, the record is clear that the federal government compensates student loan servicers more for helping borrowers avoid delinquency and default. Thus, for the student loan context, time spent attempting calls to wrong numbers is not only time lost that a caller could have been speaking with a borrower (or at least trying to do so), but also potentially money lost as that borrower becomes more delinquent.

Moreover, the impact on the new subscriber to a reassigned number could be contained in this context, as the number of calls to the reassigned number would separately be subject to any limit on exempt calls generally that the FCC may adopt.

Many commenters have highlighted the practical problems that arise from the Commission’s approach. For example, a comprehensive resource of reassigned numbers does

⁸³ EFC *Ex Parte* at 6.

not currently exist.⁸⁴ Further, when a servicer does not have a live conversation with a called party (*e.g.*, the call is not answered or the servicer sends a text message) it is extremely unlikely that the servicer will receive any actual or reliable constructive knowledge that a number has been reassigned.⁸⁵

Navient further agrees with commenters that Congress did not intend for the FCC's one-call attempt framework for calls to reassigned numbers to apply to exempted calls.⁸⁶

Commenters recognize that servicers would potentially be put at new risk of TCPA violations under the Commission's proposed rules as a result of calls to reassigned numbers.⁸⁷ Navient agrees that it would be the "height of unfairness" for the FCC to penalize entities calling pursuant to an exemption for calls to reassigned numbers when the calling party did not know the number was reassigned.⁸⁸

Meanwhile, commenters attempt to "have their cake and eat it too" when arguing in favor of the Commission's one-call reassignment window. For example, NCLC argues that "it is cheaper to call all possible numbers than to incur the costs to determine the correct number."⁸⁹ NCLC doesn't provide any cost-based evidence for its assertion, with which Navient disagrees (and, as noted above, student loan servicers in fact are financially incentivized to reach the borrower and help him or her avoid delinquency and default). But NCLC also argues against calls to persons other than the borrower *on the preceding page*.⁹⁰ NCLC claims that the FCC's

⁸⁴ See Nelnet Comments at 11-12.

⁸⁵ See ACA Comments at 12.

⁸⁶ See ABA/CBA *Ex Parte* at 9; ConServe *Ex Parte* at 7; SLSA Comments at 23-24.

⁸⁷ See Comments of Quicken Loans, CG Docket No. 02-278 at 4-5 (filed June 6, 2016).

⁸⁸ AFSA *Ex Parte* at 3.

⁸⁹ NCLC Comments at 22.

⁹⁰ *Id.* at 21.

reassigned number proposal is completely reasonable because alternative means are available to locate borrowers, but if NCLC had its way the Commission would cut-off an important avenue for calling parties to make contact with borrowers.

For these reasons, the Commission should not impose here its “one call attempt” framework for calls to reassigned numbers. Instead, good faith calls to unintended recipients – including calls to reassigned numbers – should be covered under the scope of the exemption.⁹¹ At a minimum, however, the “one call attempt” window should only become applicable as of the first live contact with a borrower.⁹²



VI. ADOPTING AN OPT-OUT PROVISION WOULD ULTIMATELY HARM BORROWERS AND TAXPAYERS IS ANTITHETICAL TO THE AMENDMENT.

Several commenters urge the Commission not to adopt the proposed opt-out provision. Navient agrees that an opt-out provision would contradict the Bipartisan Budget Act amendment and the needs of borrowers, and risks conflicting with other federal policies. As discussed above, a borrower that cannot be reached cannot be helped.

⁹¹ ACA Comments at 11-12.

⁹² See NCHER *Ex Parte* at 7; Nelnet Comments at 12.

The Bipartisan Budget Act does not provide the FCC with authority to permit debtors to opt-out of receiving calls related to debts owed to or guaranteed by the federal government.⁹³ As NCHER explained, “[g]iving the consumer the ability to revoke the statutory authority to make a covered call without consent contravenes the exception by effectively re-imposing a consent requirement.”⁹⁴

In addition, adopting a specific opt-out requirement is likely to lead to expanded TCPA litigation, which is contrary to Congress’ goal in creating this exemption. For example, an entity “that provides instructions for consent revocation” could run the risk of “allegations that the organization provided specific methods of consent revocation rather than allowing a consumer to revoke his or her consent through ‘any reasonable means.’”⁹⁵

The FCC’s proposed opt-out provision is also inconsistent with federal requirements, such as the Department of Education’s requirement that federal loan servicers make a certain number of reminder and follow-up calls to borrowers who are in the process of applying for a federal loan, irrespective of whether the borrower has provided consent for such calls.⁹⁶ The proposed opt-out provision also is incongruent with the Higher Education Act, which “requires lenders/servicers to make collection calls to consumers that are delinquent on their federal student loans, in order to satisfy minimum due diligence requirements.”⁹⁷ Navient joins with these commenters in urging the Commission not to adopt the proposed opt-out requirement, especially for the student loan context.

⁹³ See EFC *Ex Parte* at 8.

⁹⁴ NCHER *Ex Parte* at 14.

⁹⁵ ECMC *Ex Parte* at 9.

⁹⁶ Nelnet Comments at 15.

⁹⁷ Iowa Student Loan *Ex Parte* at 2.

If the Commission does adopt rules related to an opt out, at a minimum it should adopt common sense provisions that will benefit borrowers. For example, Navient recommends that, to the extent the FCC mandates an opt-out requirement, borrowers should be required to reach out to their servicer by placing a call or signing into their online accounts to exercise the opt-out. With this approach, the FCC can promote additional discussions between servicers and borrowers while allowing an opt-out opportunity. It would also give borrowers the opportunity to review their accounts and make payments or changes while they are signed into the account.

Navient also recommends that a previous request to opt-out not apply to subsequent collectors of the same debt.⁹⁸ Borrowers benefit when they receive information about their debt and repayment options, and a borrower that opts out of calls from one lender may nonetheless choose to receive calls from a subsequent lender. As such, any opt-out provision should be lender-specific. Finally, the FCC should give callers flexibility in how notice of the right to opt-out is provided to the debtor.

VII. COMMISSION REGULATIONS ON RESIDENTIAL LINES OR THE DURATION OF CALLS OR MESSAGES WOULD BE CONTRARY TO THE STATUTORY AMENDMENT AND BORROWER INTERESTS.

A. Many commenters agree that limits on the number and duration of calls to residential landlines exceed the scope of the amendment.

The Bipartisan Budget Act amendment provides that the Commission may “restrict or limit the number and duration of calls made to a telephone number assigned to a *cellular telephone service* to collect a debt owed to or guaranteed by the United States.”⁹⁹ Regulations on

⁹⁸ See ConServe *Ex Parte* at 11.

⁹⁹ Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 301, 129 Stat. 584 (2015) (emphasis added).

residential telephone lines would exceed the scope of and contradict the language of the amendment.¹⁰⁰

Several commenters agree with Navient that the Commission should not adopt rules that include calls to residential telephone lines, and agree that rules that limit the number and duration of calls to residential landlines contravene Congress' intent in adopting the Bipartisan Budget Act.¹⁰¹ As noted by EFC and SLSA, such calls “would not have required prior express consent even before” the Bipartisan Budget Act amendment to the TCPA.¹⁰² Autodialed calls to residential lines already are allowed, separate from any FCC exemption.¹⁰³

B. Many commenters agree that the Commission should not adopt a specific limit for the length or duration of exempted calls or text communications.

The Commission should not limit the duration of calls or text messages placed under the exemption.¹⁰⁴ Conversations between borrowers and lenders differ based on myriad factors, including the stage of the collection process and the repayment options available to a specific borrower.¹⁰⁵ Limiting the duration of calls or messages limits the opportunity for consumers to learn important information about their loans. Such a limitation also poses the risk of unintended consequences to the detriment of the borrower.

¹⁰⁰ ConServe *Ex Parte* at 12 (“If Congress had intended for the Commission to regulate landlines it would have clearly omitted the term ‘cellular’ from the Budget Act Amendment.”); ECMC *Ex Parte* at 11 (“[T]he Congressional mandate for the FCC to promulgate regulations under the Budget Act amendments to the TCPA is limited to regulations related to calls regarding debt owed or guaranteed by the United States placed to cellular telephones using automatic dialing equipment without the consent of the consumer.”).

¹⁰¹ Iowa Student Loan *Ex Parte* at 2; *see also* OSLA *Ex Parte* at 2.

¹⁰² EFC *Ex Parte* at 8; *see also* SLSA Comments at 32 (“Given that the FCC has already provided in its regulations that commercial, non-telemarketing calls to residential landlines are not subject to the prior express consent requirements that apply to calls to cell phones, we think that the language added by the [amendment] was probably not necessary.”).

¹⁰³ Navient Comments at 39.

¹⁰⁴ *Id.* at 51.

¹⁰⁵ *Id.*

Like Navient, many commenters oppose adopting a limit on call duration. ACA notes that calls “to resolve an outstanding debt are highly situational and fact-specific,” sometimes requiring “extensive dialogue.”¹⁰⁶ ABA/CBA and others agree with Navient that limiting the duration of exempted calls is inconsistent with servicing requirements and would interfere with important conversations between borrowers and lenders.¹⁰⁷ There are practical considerations, too, for such a limit. The Consumer Mortgage Coalition explains that a consumer that does not wish to continue a call from a lender may simply hang up and disconnect the call, while a consumer that would like to continue a call could nonetheless be disconnected at the time limit.¹⁰⁸

Commenters similarly agree with Navient in opposing the adoption of a limit on the length of text communications.¹⁰⁹ Like voice calls to collect debt, text messages will vary depending on the needs of the borrower and lender. At a minimum, commenters recognize that any limit on text communications must account for any legally required disclosures.¹¹⁰

Neither NCLC’s proposed 30-second limit on voice messages nor EFC’s proposed 60-second limit on voice messages would provide enough time for required disclosures.¹¹¹ As the CFPB underscores, any limit in the duration of a voice call or text message must be long enough to allow callers to make all disclosures required under the law. Callers may have to make

¹⁰⁶ ACA Comments at 20; *see also* CMC *Ex Parte* at 15; ConServe *Ex Parte* at 10.

¹⁰⁷ ABA/CBA *Ex Parte* at 13-23.

¹⁰⁸ CMC Comments at 15.

¹⁰⁹ Navient Comments at 51.

¹¹⁰ *See, e.g.*, ACA Comments at 19-21.

¹¹¹ NCLC Comments at 26; EFC *Ex Parte* at 8.

disclosures under the FDCPA and Higher Education Act, among others.¹¹² Navient estimates callers would need *at least* 100 seconds to make all required disclosures, and thus any time limit shorter than that would be unreasonable.

VIII. THE FEDERAL TRADE COMMISSION BUREAU STAFF’S COMMENTS INCORRECTLY ATTEMPT TO REFRAME THE TCPA AMENDMENT AS AN ADJUNCT OF THE FAIR DEBT COLLECTION PRACTICES ACT.

The FCC should reject the attempts by the Federal Trade Commission Bureau of Consumer Protection (the “FTC”) staff to “harmonize” the Bipartisan Budget Act amendment with the Fair Debt Collection Practices Act (“FDCPA”). The TCPA and FDCPA address different goals and target different actors. Moreover, the Bipartisan Budget Act amendment would lose all purpose and effect if it was read to simply have the same meaning as the FDCPA. If Congress had wanted to harmonize the two laws, it could have done so (and would not have done so by means of a few sentences granting an exemption from the TCPA).

Many proposals in the FTC’s comments seek to harmonize the Bipartisan Budget Act amendment’s exemption with existing requirements under the FDCPA.¹¹³ For example, FTC staff suggests that a borrower being “in default” should serve as the threshold for exempting a call under the amendment, because default (rather than delinquency) is the touchstone of the FDCPA.¹¹⁴ FTC staff also recommends that covered calls be limited to calls directed at the

¹¹² CFPB Comments at 12 (“the Bureau believes that any time limit must be long enough to: (1) protect consumers from the harms from call abandonment and dead air, (2) permit any required communications under the laws and regulations within the Bureau’s authority, and (3) permit communications necessary to facilitate consumer understanding of loss mitigation options or of alternative repayment arrangements provided for under federal law, including protections provided for federal student loan borrowers under Title IV of the Higher Education Act.”).

¹¹³ *See generally* Comments of the Staff of the Federal Trade Commission’s Bureau of Consumer Protection, CG Docket No. 02-278 (filed June 6, 2016) (“FTC Comments”).

¹¹⁴ *Id.* at 5-6.

person obligated to pay the debt.¹¹⁵ Finally, FTC staff argues that consumers should be able to opt-out of exempted calls.¹¹⁶

In all of these instances, the FTC staff's proposals seek to align the language and restrictions of the FDCPA with the exemption provided in the Bipartisan Budget Act amendment to the TCPA. However, the Bipartisan Budget Act amendment targets different actors, actions, and goals than the FDCPA, and staff provides no independent justification for its proposals. For example, the Bipartisan Budget Act amendment specifically targets calls made for the purpose of collecting on federal debt, regardless of whether it is a first-party or third-party context. The FDCPA is a law with a very different, and broader, applicability. It applies generally to debt collection calls and is focused on third-party debt collection. It does not apply to lenders that seek to collect debt they hold directly.

“Harmonizing” the acts as proposed by the FTC staff would in fact cause discordant requirements for callers. As ECMC points out in its comments, the debt collection activities of a federal guarantee agency fall within an exemption to the FDCPA as a *bona fide* fiduciary to the federal government. And as outlined by Nelnet, the FDCPA provisions exclude student loan servicers.¹¹⁷ Student loan servicers like Navient are also required to follow rules and regulations governing borrower contact as established by the Higher Education Act.¹¹⁸ Alignment of the TCPA exemption with the FDCPA – in tandem with these exclusions and other statutory requirements – would thus create a regime of duplicative or contradictory requirements. Modeling TCPA rules after the FDCPA could also mean that any protections or exemptions

¹¹⁵ *Id.* at 6.

¹¹⁶ *Id.* at 10.

¹¹⁷ Nelnet Comments at 8-9.

¹¹⁸ ECMC *Ex Parte* at 8.

enjoyed by third-party debt collectors under the FDCPA would not apply to callers that hold the student loan debt directly, or to other direct lenders of federal loans. Therefore, the FCC should reject the FTC's proposals.



IX. CONCLUSION

Student loan servicers like Navient play a crucial role in helping federal student loan borrowers stay on track with payments and out of delinquency and default. The Bipartisan Budget Act amendment to the TCPA can facilitate the efforts of federal loan servicers to discuss loan repayment options and loan status with borrowers.

Navient and other commenters agree, however, that substantial revisions to the Commission's proposed rules are needed. The proposed three-calls-per-month limit is insufficient to meet the goals of the Bipartisan Budget Act and the needs of borrowers. Virtually all commenters agree that servicing calls and some pre-delinquency calls should be allowed, but the Commission should allow all calls made to collect debts owed to or guaranteed by the federal government. The Commission should also allow calls to persons other than the borrower and to telephone numbers other than the number provided by the borrower. Moreover, Navient urges the Commission not to adopt an opt-out provision, limits on calls to residential landlines, or

limits on the length or duration of exempted calls or text communications. Finally, the Commission should reject efforts to align the language and provisions of the exemption with the FDCPA. A wealth of evidence in the record supports these revisions.

Respectfully submitted,

/s/ Sarah E. Ducich

Sarah E. Ducich
Lucia Lebens
Joel S. Mayer
NAVIENT CORPORATION
999 North Capitol Street NE, Suite 301
Washington, DC 20002
(202) 654-5900

Mark W. Brennan
C. Sean Spivey
Cara O. Schenkel
HOGAN LOVELLS US LLP
555 Thirteenth Street, NW
Washington, DC 20004
(202) 637-5534

Attorneys for Navient Corp.

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